

# The Burger Court Opinion Writing Database

## *Colgrove v. Battin*

413 U.S. 149 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



9

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 22, 1973

Re: No. 71-1442 - Colgrove v. Battin

Dear Bill:

I have concluded to affirm and  
will assign to Bill Brennan.

Regards,

W.B.

Mr. Justice Douglas

wp

2

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

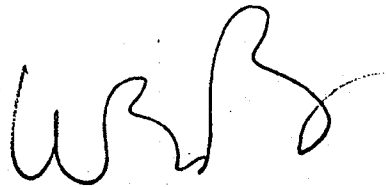
March 14, 1973

Re: 71-1442- Colgrove v. Battin

Dear Bill:

Please join me.

Regards,



Mr. Justice Brennan

Copies to the Conference

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REPRODUCED BY THE NATIONAL ARCHIVES

6  
Supreme Court of the United States  
Washington, D. C. 20543

*My client*

CHAMBERS OF  
THE CHIEF JUSTICE

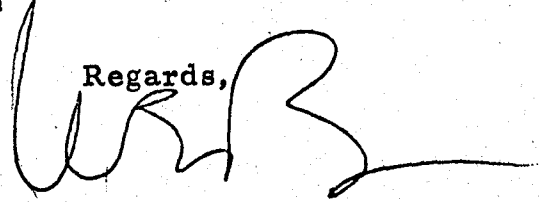
March 29, 1973

Re: 71-1442 - Colgrove v. Battin

Dear Bill:

I may be adding a "small comment" while joining  
fully in your opinion.

I will try to get it in in the recess when I am not  
spending three days on the Judicial Conference and the  
Conference of Circuit Chiefs!

Regards,  


Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stevens  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Douglas, J.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1442

Circulated: 5-14-73

Recirculated: \_\_\_\_\_

Roland V. Colgrove, Petitioner,  
v.  
James F. Battin, United States  
District Judge for the Dis-  
trict of Montana.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[May —, 1973]

MR. JUSTICE DOUGLAS, dissenting

Rule 13 (d) of the Revised Rules of Procedure of the  
United States District Court of Montana provides:

"A jury for the trial of civil cases shall consist of  
six persons."

Rule 48 of the Federal Rules of Civil Procedure—which  
came into being as a result of a recommendation of this  
Court to Congress which Congress did not reject\*—  
rests on a federal statute.

The two Rules do not mesh; they collide. Rule 48  
says that the only way to obtain a trial with less than  
12 jurors or a verdict short of a unanimous one is by  
stipulation.

As MR. JUSTICE MARSHALL makes clear in his dis-  
sent, while the parties under Rule 48 could stipulate for  
trial by an 11-man jury, under the Montana District  
Court rule only six jurors could be required. Since all

\*At the time the Rules of Civil Procedure became effective they  
had to be submitted to Congress by the Court and Congress had  
90 days to reject them. 28 U. S. C. § 2072. At that time § 2072  
provided that these Rules "shall preserve the right of trial by jury  
as at common law and as declared by the Seventh Amendment to  
the Constitution." It seems clear beyond peradventure that the  
draftsmen thought a jury of 12 was required, save as the parties  
by stipulation waived that right by stipulating to a lesser number.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U. S. DEPARTMENT OF JUSTICE

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 71-1442

Circulated: \_\_\_\_\_

Recirculated: 6-15

Roland V. Colgrove, Petitioner,	} On Writ of Certiorari
"	
James F. Battin, United States	
District Judge for the Dis-	
trict of Montana.	to the United States Court of Appeals for the Ninth Circuit.

[June —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE POWELL concurs, dissenting.

Rule 13 (d) of the Revised Rules of Procedure of the United States District Court of Montana provides:

"A jury for the trial of civil cases shall consist of six persons."

Rule 48 of the Federal Rules of Civil Procedure—which came into being as a result of a recommendation of this Court to Congress which Congress did not reject\*—rests on a federal statute.

The two Rules do not mesh; they collide. Rule 48 says that the only way to obtain a trial with less than 12 jurors or a verdict short of a unanimous one is by stipulation.

As MR. JUSTICE MARSHALL makes clear in his dissent, while the parties under Rule 48 could stipulate for trial by an 11-man jury, under the Montana District

\*At the time the Rules of Civil Procedure became effective they had to be submitted to Congress by the Court and Congress had 90 days to reject them. 28 U. S. C. § 2072. At that time § 2072 provided that these Rules "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." It seems clear beyond peradventure that the draftsmen thought a jury of 12 was required, save as the parties by stipulation waived that right by stipulating to a lesser number.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall —  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Brennan, J.

1st DRAFT

Circulated: 3-2-73

SUPREME COURT OF THE UNITED STATES

Recirculated: \_\_\_\_\_

No. 71-1442

Roland V. Colgrove, Petitioner,  
v.  
James F. Battin, United States  
District Judge for the Dis-  
trict of Montana. } On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[March —, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Local Rule 13 (d) (1) of the District Court for the District of Montana provides that a jury for the trial of civil cases shall consist of six persons.<sup>1</sup> When respondent District Court Judge set this diversity case for trial before a jury of six in compliance with the Rule, petitioner

<sup>1</sup> Rule 13 (d) (1) provides:

"A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled."

Similar local rules have been adopted by 54 other federal district courts at least as to some civil cases. See the appendix to Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F. R. D. 507, 535-542 (1973) (the District Court of Delaware has since adopted a rule effective January 1, 1973). In addition, two bills were introduced in the 92d Congress to reduce to six the number of jurors in all federal civil cases. H. R. 7800, 92d Cong., 1st Sess. (1971); H. R. 13, 496, 92d Cong., 2d Sess. (1972). H. R. 7800, insofar as it related to civil juries, has received the approval of the Committee on the Operation of the Jury System of the Judicial Conference of the United States. Annual Report of the Director of the Administrative Office of the United States Courts 1971, at 41 (1972). The conference itself at its March 1971 meeting endorsed "in principle" a reduction in the size of civil juries. *Ibid.*

7, 9, 11, 13

*Held*

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

Circulated: \_\_\_\_\_

No. 71-1442

Recirculated: 3-6-73

Roland V. Colgrove, Petitioner,  
v.  
James F. Battin, United States  
District Judge for the Dis-  
trict of Montana.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[March —, 1973]

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11, 12, 15

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

3rd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 71-1442

Recirculated: 4-9-73

Roland V. Colgrove, Petitioner, v. James F. Battin, United States District Judge for the Dis- trict of Montana.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[March —, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Local Rule 13 (d)(1) of the District Court for the District of Montana provides that a jury for the trial of civil cases shall consist of six persons.<sup>1</sup> When respondent District Court Judge set this diversity case for trial before a jury of six in compliance with the Rule, petitioner

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SSSBNUG 50 ADV 11 N

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 19, 1973

The following case was held for No. 71-1442 --  
Colgrove v. Battin:

In No. 72-5348 -- Cooley v. Strickland Trans. Co., the Court of Appeals for the Fifth Circuit held that a local district court rule providing for six-member civil juries in federal court did not violate the Seventh Amendment, the statutory equivalent (28 U.S.C. §2072), or Rule 48 of the Fed. Rules of Civ. Proc. This holding parallels exactly our disposition in Colgrove and I would therefore deny certiorari.

WJB

3  
M

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 13, 1973

Re: No. 71-1442, Colgrove v. Battin

Dear Thurgood,

Please add my name to your dissenting opinion  
in this case.

Sincerely,

P.S.  
/

Mr. Justice Marshall

Copies to the Conference

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U.S. DEPARTMENT OF JUSTICE

8

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 6, 1973

Re: No. 71-1442 - Colgrove v. Battin

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

Copies to Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

SECRETARY OF THE SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 8, 1973

Re: No. 71-1442 - Colgrove v. Battin

Dear Bill:

In due time I will circulate  
a dissent in the above case.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: Conference

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Circulated: APR - 6 1973

No. 71-1442

Recirculated: \_\_\_\_\_

Roland V. Colgrove, Petitioner,  
v.  
James F. Battin, United States  
District Judge for the Dis-  
trict of Montana.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[April —, 1973]

MR. JUSTICE MARSHALL, dissenting.

Some 30 years ago, Mr. Justice Black warned his brethren against the "gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway v. United States*, 319 U. S. 372, 397 (1943) (dissenting opinion). Today, the erosion process reaches bed-rock. In the past, this Court has sanctioned changes in "mere matters of form or procedure" in jury trials, *Baltimore & Carolina Line Inc. v. Redman*, 295 U. S. 654, 657 (1935), and in "pleading or practice" before juries, *Walker v. New Mexico & Southern Pacific Co.*, 165 U. S. 593, 596 (1897). But before today, we had always insisted that "whatever may be true as to registration which changes any mere details of a jury trial, it is clear that a statute which destroys [a] substantial and essential feature thereof is one abridging the right." *American Publishing Co. v. Fisher*, 166 U. S. 464, 468 (1897). See also *Dimick v. Schiedt*, 293 U. S. 474 (1935); *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899).

Now, however, my brethren mount a frontal assault on the very nature of the civil jury as that concept has been understood for some seven hundred years. No one need be fooled by reference to the six-man trier of fact utilized in the District Court for the District of Montana as a "jury." This six-man mutation is no more a "jury"

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WJ [Signature]

3, 4, 5, 6, 7, 8, 9, 10, 14, 15,  
16, 17, 18, 19, 21, 22.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

FROM: Marshall, J.

No. 71-1442

Circulated: \_\_\_\_\_

Recirculated: **APR 13 1973**

Roland V. Colgrove, Petitioner,  
v.  
James F. Battin, United States  
District Judge for the Dis-  
trict of Montana.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[April —, 1973]

MR. JUSTICE MARSHALL, dissenting.

Some 30 years ago, Mr. Justice Black warned his brethren against the "gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway v. United States*, 319 U. S. 372, 397 (1943) (dissenting opinion). Today, the erosion process reaches bedrock. In the past, this Court has sanctioned changes in "mere matters of form or procedure" in jury trials, *Baltimore & Carolina Line Inc. v. Redman*, 295 U. S. 654, 657 (1935), and in "pleading or practice" before juries, *Walker v. New Mexico & Southern Pacific Co.*, 165 U. S. 593, 596 (1897). But before today, we had always insisted that "whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys [a] substantial and essential feature thereof is one abridging the right." *American Publishing Co. v. Fisher*, 166 U. S. 464, 468 (1897). See also *Dimick v. Schiedt*, 293 U. S. 474 (1935); *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899).

Now, however, my brethren mount a frontal assault on the very nature of the civil jury as that concept has been understood for some seven hundred years. No one need be fooled by reference to the six-man trier of fact utilized in the District Court for the District of Montana as a "jury." This six-man mutation is no more a "jury"

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WHD

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 5, 1973

Re: No. 71-1442 - Colgrove v. Battin

Dear Bill:

Please join me.

Sincerely,

*H. A. B.*

Mr. Justice Brennan

Copies to the Conference

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 12, 1973

No. 71-1442 Colgrove v. Battin

Dear Thurgood:

Absence at the Fifth Circuit Conference has prevented my writing you sooner.

I am satisfied, on the basis of a first reading, that I agree with and will be able to join you in most of your opinion.

In view of the study that I made of this general area last Term in the Johnson and Apodaca cases, I may try to do a draft of a short concurrence reemphasizing the historical approach theme which you have also relied upon.

I am just back from El Paso today, and may not get to this until after we complete the April arguments.

Sincerely,

*Lewis*

Mr. Justice Marshall

cc: The Conference

June 14, 1973

No. 71-1442 Colgrove v. Battin

Dear Chief:

In accordance with your request, I send you immediately what I propose to do in Colgrove, and circulate to the Conference this afternoon.

It may be a day or two before my little dissent is printed.

Sincerely,

The Chief Justice

lfp/ss

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 14, 1973

No. 71-1442 Colgrove v. Battin

Dear Bill:

Please join me in your dissenting opinion.

I will also add a brief explanation in a separate dissent as follows:

"I share the view of Mr. Justice Douglas that Local Rule 13(d)(1) is incompatible with the Federal Rules of Civil Procedure, and this would require a reversal of the present case. Accordingly I do not reach the constitutional issue under the Seventh Amendment which is addressed by Mr. Justice Brennan and Mr. Justice Marshall in their scholarly opinions, supra, at \_\_\_\_\_ and \_\_\_\_\_. Cf. Johnson v. Louisiana, 406 U. S. 356, 366-380 (1972). (Concurring opinion)."

I will have the foregoing printed and circulated.

Sincerely,

*L. F. Powell*

Mr. Justice Douglas

lfp/ss

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT

To: The Chief Justice  
 • Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackman  
 Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 71-1442

Circulated: JUN 15 1973

Recirculated: \_\_\_\_\_

Roland V. Colgrove, Petitioner,  
 v.  
 James F. Battin, United States  
 District Judge for the Dis-  
 trict of Montana.

On Writ of Certiorari  
 to the United States  
 Court of Appeals for  
 the Ninth Circuit.

[June —, 1973]

MR. JUSTICE POWELL, dissenting.

I share the view of MR. JUSTICE DOUGLAS that Local Rule 13 (d)(1) is incompatible with the Federal Rules of Civil Procedure, and this would require a reversal of the present case. Accordingly I do not reach the constitutional issue under the Seventh Amendment which is addressed by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in their scholarly opinions, *supra*, at — and —. Cf. *Johnson v. Louisiana*, 406 U. S. 356, 366-380 (1972) (concurring opinion).

WD

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 11, 1973

Re: No. 71-1442 - Colgrove v. Battin

Dear Bill:

Please join me in your opinion for the Court.

Sincerely,

*WHR*

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE